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In the Supreme Court of the United States

October Term, 1982

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, STATE OF ARIZONA, et al.,

Petitioners,

v.

NATHALIE NORRIS, on behalf of herself and all others similarily situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS

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INTEREST OF THE AMICUS CURIAE

The National Association of Insurance Commissioners (NAIC) is an unincorporated association whose membership consists of the principal state regulatory officials charged by law with the responsibility of regulating the business of insurance within each state, the District of Columbia, Guam, Puerto Rico and the Virgin Islands. The NAIC submits this *amicus curiae* brief with the consent of all parties to this case.

The individual state insurance commissioners who comprise the NAIC and the insurance consuming public, on whose behalf they regulate, have a vital interest in the granting of this petition. The Ninth Circuit Court of Appeal's decision blurs the jurisdictional lines between state regulation of the insurance industry under state insurance laws and federal regulation of the employment practices of employers under Title VII of the Civil Rights Act of 1964.

The NAIC asks this Court to review the Ninth Circuit holding so as to provide NAIC members with certainty regarding Title VII's potential impact on the regulation of the business of insurance

ISSUE PRESENTED

Should this Court issue a writ of certiorari to review the Ninth Circuit opinion in the instant case in order to resolve the difficulties in applying *Manhart* and thereby prevent the blurring of jurisdictional lines between state and federal regulation of the insurance industry?

SUMMARY OF ARGUMENT

The decision in the instant case reflects the tendency of lower courts to extend the holding of *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978), to include the application of the *Manhart* rationale to situations in which the employer does not self-insure, but does participate in the insurance plan offered its employees. This extension of *Manhart* blurs the jurisdictional lines between the operation of state regulation of insurer solvency and federal regulation of the employment practices of employers under Title VII of the Civil Rights Act of 1964.

The McCarran-Ferguson Act dictates that NAIC members regulate private insurance companies engaged in the "business of insurance." Thus, private insurers are exempt from Title VII liability unless they are both functioning as employers within the meaning of the federal statute, and are also engaged in activities other than the "business of insurance." Private insurers qualifying for this exemption must follow the various state laws to satisfy the state insurance commissioners (NAIC members) that their company practices are financially sound. If the company takes on more of the characteristics of an "employer" under Title VII than of an insurer engaged in the "business of insurance," then Title VII applies. The Title VII requirements, however, are not consistent with state insurance regulations with regard to the use of sex-distinct mortality tables for the determination of the cost and benefit levels of pensions and annuities.

Thus, a conflict exists between state and federal regulations. Some entities, because they have characteristics of both state regulated insurers and Title VII employers, fall in a jurisdictionally gray area. The NAIC supports

the granting of a writ of certiorari in the instant case because its members have a strong interest in knowing for certain the exact span of their jurisdiction.

ARGUMENT

REASONS FOR GRANTING THE WRIT

This Court Should Resolve the Difficulties in Applying *Manhart* and Thereby Prevent the Blurring of Jurisdictional Lines Between State and Federal Regulation of the Insurance Industry.

Congress established the jurisdictional lines between state and federal regulation of the insurance industry by the passage of the McCarran-Feguson Act. The Ninth Circuit Court of Appeals decision in the instant case blurs these jurisdictional lines between the operation of state regulations concerning insurer solvency and federal regulations regarding employment practices of employers under Title VII of the Civil Rights Act of 1964.

The decision in the instant case reflects the tendency of lower courts to extend the holding of *Los Angeles Department of Water & Power v. Manhart,* 435 U.S. 702 (1978), to include the application of the *Manhart* rationale to situations in which the employer does not self-insure, but does participate in the insurance plan offered its employees. *Manhart* prohibits employers, under Title VII, from treating individual employees as members of a sexual class even though the higher costs for female annuities are based on women's greater longevity as a class. That is, even though a sex-based mortality table produces an annuity program that is actuarially sound, an employer may not use such a table in the computation of costs and benefits in its self-insured employee benefit program.

Manhart involved a self-insured employer and thus presented few potential conflicts with state insurance regulation of insurance companies. In contrast, subsequent lower court cases have presented such conflicts because they require application of the *Manhart* rationale to situations in which the employer is not self-insured but does participate to some degree in selecting and administering the pension and annuity plans offered its employees from private state-regulated insurance companies.

The rationale used in *Peters v. Wayne State,* 476 F. Supp. 1343 (E.D. Mich. 1979), appeal pending, No. 79-1676 (6th Cir.), is typical of these cases. The district court held that the service organization created to administer employee annuity contracts "is so intertwined with the institutions it serves that it more resembles an employer than a company engaged in the 'business of insurance.'" 476 F. Supp. at 1351. To the same effect are *Henderson v. Oregon,* 405 F. Supp. 1271 (D. Ore. 1975) and *Spirt v. Teachers Insurance and Annuity Assn.,* 93 F.R.D. 627 (S.D.N.Y. 1982); 475 F. Supp. 1298 (S.D. N.Y. 1979). Thus the application of the *Manhart* rationale has gone well beyond the self-insurance arrangement involved in that case.

This Court in *Manhart* expressed the firm resolve not to "revolutionize the insurance and pension industries." 435 U.S. at 707. However, as noted by the court in *EEOC v. Colby College,* 589 F. 2d 1139 (1st Cir. 1978), there are "possibly very great difficulties, that did not arise in *Manhart*" which do arise when the *Manhart* rationale must be applied to situations in which the employer does not self-insure, but does participate in the plan offered its employees. The *Colby* court interpreted the *Manhart* decision to dictate the use of a unisex rate in the determination of pension costs and benefits in employer-spon-

sored annuity plans. The court then pointed out the difficulties determining "[w]hether, or how, unisex insurer-operated plans can be achieved without revolutionizing the industry . . ." 589 F. 2d at 1146. Similarly, in *Sobel v. Yeshiva University*, 477 F. Supp. 1161 (S.D.N.Y. 1979), the district court referred generally to these problems as "vexing" and specifically detailed the "complex problem of applying *Manhart* to a plan funded through a private insurance company in a manner which is both consistent with that decision, and yet can be realistically carried out by the insurance industry." 477 F. Supp. at 1166.

The difficulties alluded to in these lower court decisions stem from the jurisdictional problem. Jurisdictional lines between state and federal regulation of the insurance industry were drawn by Congress in the McCarran-Ferguson Act. In *SEC v. National Securities* this Court said:

> The statute [McCarran-Ferguson Act] did not purport to make the States supreme in regulating all the activities of insurance companies; its language refers to laws 'regulating the business of insurance.' Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the 'business of insurance' does the statute apply. 393 U.S. 453, 459 (1969).

The McCarren-Ferguson Act dictates that NAIC members regulate private insurance companies engaged in the "business of insurance." Thus, private insurers are exempt from Title VII liability unless they are both functioning as employers within the meaning of the statute and are engaged in activities other than the "business of insurance." This Court in *Manhart* expressed a clear intent not to blur the jurisdictional lines between state and federal regulation. *Manhart* was not to "revolutionize the insurance and pension industries." 435 U.S. at 717.

Since *Manhart* lower courts have found it necessary to decide whether entities "more resemble an employer than a company engaged in the 'business of insurance.'" 476 F. Supp. at 1351. The resolution of this question requires clearly deliniated lines as to which systems of regulation, state or federal, applies to a given employee annuity plan. For example, plans that have characteristics of both "employers" under Title VII and companies engaged in the "business of insurance" under the McCarran-Ferguson Act are subject to potential conflicting regulations. If such an entity is subject to Title VII, it will have to disregard actuarial experience in computing annuity and pension costs and benefits. If the entity is subject to state regulation as an insurance company engaged in the "business of insurance," it must follow the state laws to satisfy the state insurance commissioners that its practices are financially sound. Those regulations are not necessarily consistent. A good example of the problem is presented in *Spirt v. Teachers Insurance and Annuity Assn.*, 93 F.R.D. 627 (S.D.N.Y. 1982) and 475 F. Supp. 1298 (S.D.N.Y. 1979). The insurer (TIAACREF) in the course of settlement negotiations agreed to adopt mortality tables that would eliminate sex-based differentiation in the benefits received by plan participants. However, the details are yet to be worked out. The EEOC and the New York Superintendent of Insurance have examined three different proposed unisex tables and failed to agree. The EEOC claims violation of Title VII and the Equal Pay Act, and the State of New York claims violation of New York Insurance Law. 93 F.R.D. at 632-633. An appeal is pending.

CONCLUSION

In summary, a conflict exists between state and federal regulations affecting the use of sex distinct mortality tables by insurers. The NAIC asks this Court to grant a writ of certiorari to review the Ninth Circuit opinion in the instant case, and thereby resolve the difficulties in applying *Manhart* to prevent the blurring of jurisdictional lines between state and federal regulation of the insurance industry.

Respectfully submitted,

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